Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-836

VALLEY DISTRIBUTING COMPANY,
An Arizona Corporation

Petitioner,

vs.

JOE E. DAVIS and EQUAL
EMPLOYMENT OPPORTUNITY
COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JENNINGS, STROUSS & SALMON

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, No. 73-2725, is reported at 522 F.2d 827 (1975). A copy of that opinion is appended hereto.

JURISDICTION

The decision here sought to be reviewed is dated and was entered in the Ninth Circuit, July 30, 1975. A Petition for Rehearing, duly filed, was denied by that court, September 15, 1975.

Jurisdiction to review the decision of the Court below is conferred by 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals below erred in holding, contrary to the Tenth Circuit decision in Dubois v. Packard Bell Corp., infra, that rejection by a state agency of an untimely discrimination complaint constitutes a "termination of state proceedings" within the meaning of the applicable EEOC regulation thus giving

respondent the benefit of the 180 day period of limitations under the statutory amendment of March 24, 1972?

2. Whether Congress intended a subsequent extension of the statutory limitation period should revive a claim previously barred?

3. Whether Davis' concealment from EEOC of the original February 22, 1972 filing with the State should preclude the use of March 31, 1972 as the federal filing date?

STATUTES AND REGULATIONS INVOLVED

Arizona Revised Statutes, § 41-1481, (in pertinent part):

> Complaint by person aggrieved; Investigation; hearings, findings; order
>
> A. Any person claiming to be aggrieved by an alleged discriminatory practice or act contrary to the provisions of this chapter may, within sixty days from the date of the alleged practice or act, file with the civil rights division of the department of law a verified complaint in writing which shall state the name and address of the person alleged to have committed the practice or act complained of, the particulars of the alleged discrimination and such other information as may be required by the division. After a complaint is filed and found to be in proper order, the division shall make an investigation of the charge. (Emphasis supplied)

Section 706(d), Title VII, Civil Rights Act of 1964, as amended, 1970, 42 U.S.C. § 2000e-5(d)[1]:

> A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, exccept that in the case of an unlawful employment practice with respect to which the person

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[1] Title VII was amended on March 24, 1972, by enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending 42 U.S.C. § 2000e (1970). Section 706(b) of the 1964 Act was relettered 706(c); section 706(d) was relettered 706(e). The limitation periods were extended from 90 to 180 days where the initial filing is with EEOC, and from 210 to 300 days where complainant first submits his claim to a state agency. 42 U.S.C. § 2000e-5(e) (Supp. III, 1973).

aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. (Emphasis supplied)

Section 706(b), Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (in pertinent part):

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated....(Emphasis supplied)

Section 14, Public Law 92-261; 86 Stat. 103:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to all charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter. (Emphasis supplied)

EEOC Regulation set forth at 29 C.F.R. § 1601.12(b)(1)(iii):

> The aggrieved party and any person filing a charge on behalf of an aggrieved party shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(c), and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 (or, where appropriate, 120) days have passed, whichever occurs first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within sixty (60) (or, where appropriate, 120) days without notification to the Commission of such action the commis-

sion on the date the person making the charge was notified of the termination. (Emphasis supplied)

STATEMENT OF THE CASE

Respondent Davis filed this action against Petitioner, Valley Distributing Company alleging discrimination in employment under Title VII of the Civil Rights Act of 1964.[2] On motion filed by Valley Distributing, the District Court entered summary judgment against Davis on the ground that his complaints filed with the Arizona Civil Rights Commission and the EEOC had been filed after the applicable federal and state statutes of limitations had expired. The EEOC Intervened in the District Court and also prosecuted the appeal in the Court of Appeals.

The facts germane to this petition are the following:

Appellant had been discharged from employment October 31, 1971. He

[2] 42 U.S.C. § 2000e et seq., as amended (1970)

filed a complaint with the Arizona Civil Rights Commission 114 days later, on February 22, 1972. The Arizona Commission dismissed the complaint as barred by Arizona's 60-day statute of limitations. Arizona Revised Statutes, Section 41-1481. Appellant thereafter filed a Charge of Discrimination with the Equal Employment Opprotunity Commission on March 14, 1972, 135 days after his dismissal and 45 days after the then applicable 90 day federal statute had run. On March 24, 1972, Title VII was amended by the Congress to extend the 90 day initial filing from 90 to 180 days.[3] On March 29, after the

[3] Title VII was amended March 24, 1972, by enactment of the Equal Employment Opprotunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending 42 U.S.C. § 2000e (1970). Section 706(b) of the 1964 Act was relettered 706(c); section 706(d) was relettered 706(e). The limitation periods were extended from 90 to 180 days where the initial filing is with EEOC, and from 210 to 300 days where complainant first submits his claim to a state agency. 42 U.S.C. § 2000e-5(e) (Supp. III, 1973).

statutory amendment had taken effect, and two weeks after the initial EEOC filing, EEOC referred appellant's complaint to the Arizona Commission. Two days later, 152 days after appellant's discharge, the Arizona Commission returned the complaint to EEOC, again declining the accept the untimely filing.

Highly germane is the fact that at the time of the March 14 EEOC filing, respondent Davis concealed from EEOC the fact that he previously had attempted a state filing on February 22.[4] Had Davis disclosed this fact, EEOC would never have attempted the deferral to the

(3 cont'd.)
The District Court below held that respondent Davis could not avail himself of the extended federal filing period for the reason that a late state filing was not a "termination of state proceedings" within the meaning of subsection 706(d) and therefore was not an event which could trigger the extended period. The Court of Appeals below expressly declined to address this point (527 F.2d 827 at 833).

[4] Question No. 4 on the March 14, 1972 Charge of Discrimination, signed by Davis, appear-

state and the shorter 90 day federal statute would, of necessity, have applied, thus barring the EEOC complaint in the first instance.

EEOC nevertheless assumed jurisdiction, served notice of the charge upon appellee, and conducted an investigation. On February 12, 1973, EEOC sent appellant notice of his right to sue.

Davis filed this action in the District Court March 19, 1973. Petitioner's motion sought dismissal on the ground that appellant had not filed his complaint with the Arizona Commission within 60 days of the alleged discriminatory conduct, as

(4 cont'd.)
ing at page 47 of the Clerk's Record on Appeal reads:

> "Have you filed this charge with the state or local government agency:
>
> Yes ☐ When _____
> Month Day Year
>
> No ☒

(A copy of the full Charge of Discrimination as contained in the record is appended hereto for the convenience of the Court.)

required by A.R.S. § 41-1481, and had not filed with EEOC within 90 days of that conduct as required by section 706(d) of the Civil Rights Act in cases where there has been no timely prior resort to state proceedings. The district court treated the motion as one for summary judgment and, citing Dubois v. Packard Bell Corp., 470 F.2d 973 (10th Cir. 1972), granted it.

The Court of Appeals reversed, holding that since the EEOC's attempted referral of the charge to the state on March 29, 1972 came after the effective date (March 24) of the amendment extending the time from 90 to 180 days, Davis was entitled to the 180 day period even though his complaint was actually filed and dated March 14, 1972, when the then applicable 90 day period had already expired.

The court relied on Section 14 of the 1972 Act which reads:

> The amendments made by this Act to Section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter. (Pub. L. No. 92-261 § 14, 86 Stat. 103)

The theory of the court was that since the Arizona agency sent the March 14, 1972 EEOC charge back to the EEOC on March 31, 1972, (7 days after the effective date of the 1972 Act), the charge was not deemed to have been "filed" until March 31, 1972, and was, therefore, within the amended, more lengthy, 180 day period. The court simply took the fictitious March 31 date and held it to be within the wording of the statute above quoted, to-wit: "...and all charges filed thereafter".

In reaching its decision, the court below stated:

> ...appellant's [Davis'] claim was not formally 'filed' until EEOC assumed jurisdiction after the claim was returned by the Arizona Commission....
> 522 F.2d 827 at 831

This result necessarily admits that if the Court had used the actual EEOC filing date of March 14, 1972 as the controlling date, the shorter 90 day limitation period would have applied, and Davis' claim would have been barred.

The court found justification for its decision in an EEOC Regulation at 29 C.F.R. § 1601.12(b)(1)(iii) which provides that when a complaint has been submitted by EEOC to the state agency, EEOC will consider the charge to be filed:

> ...on the termination of State or local proceedings, or after sixty days have passed, whichever comes first,...

To reach this result, the Court of Appeals necessarily held that the untimely filing and subsequent return of the complaint by the state agency constituted a "termination of State proceedings" under the EEOC Regulation above quoted. This in turn enabled the EEOC to use March 31, the return date, rather than the actual filing

date (March 14), as controlling. This, said the Court, enabled Davis to reach back 180 days from March 31 instead of 90 days from March 14.

Petitioner submits this result is patently wrong and is in direct conflict with the holding in Dubois v. Packard Bell Corp., supra., in the Tenth Circuit.

ARGUMENT

I. THE NINTH CIRCUIT DECISION IN THE INSTANT CASE IS IN CONFLICT WITH DUBOIS v. PACKARD BELL CORP., A 1972 TENTH CIRCUIT DECISION

The case, Dubois v. Packard Bell Corp., 470 F.2d 973 (10 Cir., 1972) involved a charge of discrimination filed with the EEOC 144 days after the alleged act of discrimination. The EEOC referred the complaint to the New Mexico Human Rights Commission. The New Mexico Human Rights Commission rejected the complaint as untimely under its 90 day state filing rule and returned it to the EEOC. The District

Court granted Packard Bell's Motion for Summary Judgment on the ground that failure to file with the state agency within the 90 day period prescribed by the state statute precludes application of the extended federal filing period set forth in subsection 706(d) of Title VII. That subsection, as it existed prior to the 1972 amendments, provided that where the state filing procedures set forth in subsection (d) had been followed, the 90 day federal filing period may be extended to either 210 days after the alleged unlawful employment practice occurred, or 30 days after receiving notice that the state or local agency has "terminated the proceedings under State or local law, whichever is earlier...". The Tenth Circuit stated at 470 F.2d 974:

> As the case comes to us, Mrs. Dubois contends that once she has filed charges with the appropriate state agency -- whether timely or not -- she is entitled to the benefit of this extended filing period. The narrow question we must decide, then, is whether the

> New Mexico Commission's rejection of Mrs. Dubois' complaint because it was not timely filed was a termination of proceedings within the meaning of subsection 706(d) so as to qualify for the extended federal filing period. We hold it was not, and affirm the judgment. (Emphasis supplied)

The specific holding of Dubois is that an untimely state filing does not constitute a "termination of state proceedings" so as to qualify for the extended federal filing period. The Court in the instant case recognized that our state filing was also untimely. It was untimely whether viewed as of Davis' first attempt to file with the state on February 22, 1972, some 114 days after the alleged discrimination, or on March 29, 1972, the date on which EEOC finally referred the charge to the state. But the Court of Appeals in the instant case expressly declined to reach the specific question as to what effect an untimely state filing may have on the extended filing period under subsection 706(d). Rather, in an attempt to reconcile Dubois

the court invoked the 180 day federal filing period under the 1972 amendment, reasoning that under the EEOC regulation stating that a charge is considered to be filed "...on the termination of state or local proceedings,...", the federal filing was deemed to have occurred March 31, 1972 (7 days after the effective date of the 1972 Act), when the charge was returned to EEOC by the state agency.

While it is true Dubois v. Packard Bell Corp., supra., involved the applicability of the pre-amendment extended federal filing period, whereas this case involves the applicability of the amended 180 day initial filing period, careful analysis of the decision in the case at bar discloses that it rests on precisely the same principle that controlled Dubois, to-wit, whether an untimely state filing constitutes a "termination of state proceedings." The Tenth Circuit in Dubois has held it does not, and the Ninth Circuit

has held it does. In both cases, the key factor was the referral back by the state agency of an untimely filed complaint. The Court of Appeals in this case based its use of the March 31 filing date exclusively on the EEOC regulation providing that when the complaint is submitted by EEOC to the designated state agency the commission will consider the charge to be filed:

> ...on the termination of state or local proceedings, or after sixty days have passed, whichever comes first...
> 522 F.2d 831, f.n. 11
> (Emphasis supplied)

This language, to-wit, "the termination of state or local proceedings," is virtually the same as the language of 706(d) of Title VII which the Tenth Circuit in Dubois expressly held could not be applied when the state filing was late.

Clearly, if Dubois is correct in holding that a late filing with the state does not constitute a "termination of state proceedings," then similarly the

untimely state filing in the instant case cannot properly be held to constitute a "termination of state proceedings" within the meaning of the EEOC regulation upon which the Court of Appeals relied. The court below did not analyze this dichotomy. Accordingly, the correct answer should have been that the state's referral back on March 31 could not constitute a "termination of state proceedings" since the state complaint was filed too late. This result would be consistent with Dubois and would have correctly required the Court to view the appropriate "filing" date as March 14, 1972, the date on which Davis actually filed his charge with the EEOC.

The conflict between Dubois and the case at bar is far reaching because it deals with a part of the Act requiring frequent application. It is important that the diverging views of the two courts be resolved.

II. CONGRESS DID NOT INTEND THAT A SUBSEQUENT EXTENSION OF THE STATUTORY LIMITATION PERIOD SHOULD REVIVE DAVIS' CLAIM

The Court of Appeals below stated at 522 F.2d 827, 830:

> The 1972 Act became effective March 24, 1972. The prior 90-day limitation had run on appellant's complaint some 54 days earlier. It is the general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred. James v. Continental Insurance Co., 424 F.2d 1064, 1065-66 (3d Cir. (1970). But the question is one of legislative intent; and though not free from doubt, we think it the more likely conclusion that Congress intended the extended limitations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period.

The Court concluded that the language of Section 14 was "sweeping" in that it extended the amendments to the Act to cover "...all charges filed thereafter." Having treated respondent's complaint as "filed" seven days after the date of the amendments on March 31, rather than on the

date of actual filing, March 14, the Court simply reasoned that Congress must have intended the amended 180 day period to apply in this case.

But the Court once again misses the point of Dubois in so holding. The fallacy in the Court's reasoning as previously stated, is that in order to utilize March 31 as the filing date, the Court, at least by implication, must necessarily have held also that the rejection and referral back of the stale claim by the state constituted the "termination of state proceedings" referred to in the regulation. Such is precisely what Dubois said could not be done.

It seems to petitioner that the true intent of Congress as manifested by the wording of section 14, "...and all charges filed thereafter", was to extend the coverage of the Act to all claims which were in fact validly and timely filed after March 24, 1972. Since Davis' claim

not only was barred as untimely prior to that date, but was also filed by Davis before the amendment took effect, the claim clearly cannot fit within any retroactive category which Congress may have intended the Act to reach. This is consistent also with James v. Continental Insurance Co., 424 F.2d 1064, 1065-66 (3rd Cir. 1970), cited by the Court below for the general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred.

In summary, Davis' claim was stale before it was filed, and it was filed by Davis at a time when the amended statute could not have reached it. It ought not to be given life now through a fictitious "filing" arrangement conjured up by the Ninth Circuit.

III. DAVIS'CONCEALMENT FROM THE EEOC OF THE ORIGINAL FEBRUARY 22, 1972 STATE FILING SHOULD HAVE PRECLUDED THE COURT OF APPEALS FROM USING MARCH 31, 1972 AS THE "FILING" DATE.

At the time Respondent Davis appeared at the EEOC on March 14, 1972 to file his charge of discrimination, he concealed the fact that he had already been to the state agency on February 22, 1972. See footnote number 4 on pages 8 and 9 of this Petition. When asked whether he had filed the charge with the state agency, Mr. Davis, in writing, under oath, replied that he had not. The Court of Appeals overlooked this fact even when presented in the Petition for Rehearing, and yet, its decision that the amended 180 day period should apply makes the concealment a material fact. Had plaintiff truthfully advised EEOC, thus making them aware of his untimely February 22, 1972 attempt at state filing, the later, EEOC referral to the state on March 29, 1972 would never have been made, and, of necessity, the referral back from the Arizona agency

to the EEOC on March 31, 1972 could not have occurred. Consequently, the March 24, 1972 amendment could not be invoked since it depended on a subsequent filing rather than March 14, 1972, the actual filing date.

The decision of the Court of Appeals, as it presently stands, allows Davis to profit from his own false statement to the EEOC by permitting him to invoke the amended 180 day limitation period when he was entitled only to 90 days under the pre-March 24, 1972 statute. There is nothing in the original or the amended federal statute to suggest that any charging party is entitled to two bites at the state apple and, moreover, to rely on the second bite, obtained by concealment, in order to invoke the amended 180 day statute. This, however, is precisely what respondents are attempting to do.

The use of March 31 as the "filing" date, thereby giving new life to Davis' March 14 EEOC complaint will never find ultimate support in the record.

CONCLUSION

It is respectfully submitted, based upon the foregoing, that the United States Court of Appeals has committed reversible error in the case at bar, and that a Writ of Certiorari should therefore be granted by the Court.

DATED this 11th day of December, 1975.

JENNINGS, STROUSS & SALMON

By Nicholas Udall
Nicholas Udall

By Charles E. Jones
Charles E. Jones

Attorneys for Petitioner,
Valley Distributing Company

CERTIFICATE OF SERVICE

It is hereby certified pursuant to Rule 33(1) and (2)(a) of the Rules of this Court by the undersigned, Nicholas Udall, a member of the bar of this Court, that three (3) copies of this Petition for Certiorari have been mailed this 12th day of December, 1975, postage prepaid, to the following persons:

George Logan, III, Esq.
1140 East Washington
Phoenix, Arizona 85034

Equal Employment Opportunity Commission
Attention: Mary-Helen Mautner, Esq.
1800 G. Street, N.W.
Washington, D. C. 20506

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

JENNINGS, STROUSS & SALMON

By Nicholas Udall
Nicholas Udall

APPENDIX

APPENDIX "A"

Joe E. DAVIS, Plaintiff-Appellant,

v.

VALLEY DISTRIBUTING COMPANY, Defendant-Appellee.

No. 73-2725.

United States Court of Appeals, Ninth Circuit.

July 30, 1975.

Rehearing Denied Sept. 15, 1975.

Discharged employee brought suit under Civil Rights Act claiming discrimination because of religion. The United States District Court for the District of Arizona, William P. Copple, J., entered judgment in favor of the employer on grounds that complaint filed with the Arizona Civil Rights Commission and the Equal Employment Opportunity Com-

BEST COPY AVAILABLE

mission had been filed too late. The employee appealed. The Court of Appeals, Browning, Circuit Judge, held that where only 54 days had elapsed from the expiration of the prior 90-day limitation period under federal statute for filing of initial claim with Commission at time of effective date of amendment extending period from 90 days to 180 days, discharged employee was entitled to benefit of amendment so that complaint filed less than 180 days from discharge was timely.

Reversed.

1. Limitation of Actions ⇐6(9)

Generally, subsequent extensions of a statutory limitation period will not revive a claim previously barred but question is one of legislative intent.

2. Constitutional Law ⇐308
Limitation of Actions ⇐4(2)

Where lapse of time has not invested party with title to real or personal property, it does not violate due process to repeal or extend statute of limitations even after right of action is barred and thereby restore to plaintiff his remedy and divest defendant of statutory bar.

3. Limitation of Actions ⇐6(9)

Congress, by enacting amendment to Equal Employment Opportunity Act extending from 90 to 180 days the period within which to file an initial employment discrimination complaint with the Equal Employment Opportunity Commission and from 210 days to 300 days the period for filing of claim with Commission in case aggrieved person had first filed charge with state agency, intended to extend limitation period to all unlawful practices occurring 180 days before enactment of the amendment including those barred by the prior 90-day limitation period. A.R.S. § 41–1481; Civil Rights Act of 1964, § 706(b, d) as amended 42 U.S.C.A. § 2000e–5(c, e).

4. Limitation of Actions ⇐165

Generally, statutes of limitations go to matters of remedy only.

5. Civil Rights ⇐2

Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of victim of discrimination. Civil Rights Act of 1964, § 706 as amended 42 U.S.C.A. § 2000e–5.

6. Limitation of Actions ⇐6(9)

Discharged employee was entitled to benefits of 1972 amendments to Equal Employment Opportunity Act extending the statutory period for filing of initial claim where the 90-day former limitation period had expired 54 days before the amendment extending period to 180 days, in absence of resort to state proceeding, became effective and complaint was filed with the Equal Employment Opportunity Commission prior to the expiration of the 180 days, regardless of his failure to file complaint with the Arizona Commission within the then applicable Arizona 60-day limitation. A.R.S. § 41–1481; Civil Rights Act of 1964, §§ 701 et seq., 706(d) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e–5(e).

7. States ⇐4.13

State limitation period with respect to the filing of employment discrimination claims cannot govern efficacy of federal remedy provided by Equal Employment Opportunity Act. A.R.S. § 41–1481; Civil Rights Act of 1964, § 706(b, d) as amended 42 U.S.C.A. § 2000e–5(c, e).

George Logan, III, Phoenix, Ariz., for plaintiff-appellant.

Charles E. Jones (argued), Phoenix, Ariz., for defendant-appellee.

Mary Helen Maunter (argued), E.E.O.C., Washington, D. C., for intervenor-appellant.

OPINION

Before BROWNING and DUNIWAY, Circuit Judges, and MARKEY,* Judge of the United States Court of Customs and Patent Appeals.

* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

BROWNING, Circuit Judge:

Appellant Davis brought suit under Title VII of the Civil Rights Act of 1964,[1] charging that appellee had discharged him because of his religion. The district court entered summary judgment against appellant, apparently on the ground that the complaints he had filed with the Arizona Civil Rights Commission and the Equal Employment Opportunity Commission had been filed too late.

Appellant was discharged October 31, 1971. He filed his complaint with the Arizona Civil Rights Commission 114 days later, on February 22, 1972. The Arizona Commission dismissed the complaint as barred by Arizona's 60-day statute of limitations. A.R.S. § 41–1481.[2] Appellant filed his complaint with the Equal Employment Opportunity Commission on March 14, 1972, 135 days after his dismissal. On March 29, EEOC referred appellant's complaint to the Arizona Commission.[3] Two days later, 152 days after appellant's discharge, the Arizona Commission returned the complaint to EEOC without further action. EEOC assumed jurisdiction, served notice of the charge upon appellee, and conducted an investigation. On December 12, 1972, EEOC found probable cause to believe appellant's charge was true, and on February 12, 1973, sent appellant notice of his right to sue.

Appellant filed this suit March 19, 1973. Appellee moved to dismiss on the ground that appellant had not filed with the Arizona Commission within 60 days of the alleged discriminatory conduct, as required by A.R.S. § 41–1481, and had not filed with EEOC within 90 days of that conduct as required by section 706(d) of the Civil Rights Act in cases where there has been no prior resort to state proceedings.[4] The district court treated the motion as one for summary judgment and, citing *Dubois v. Packard Bell Corp.*, 470 F.2d 973 (10th Cir. 1972), granted it.[5]

Clearly the Arizona limitation period was 60 days, and appellant did not meet it. There is a question, however, as to the applicable federal period. When appellant took his complaint to EEOC, the federal time limitations provided by section 706(d) required filing with EEOC within 90 days of the conduct complained of, except where the claimant had first submitted his charge to a state agency. In the latter case the aggrieved person could file with EEOC within 210 days after the discriminatory conduct or 30 days after termination of state proceedings, whichever was sooner. Section 4 of the Equal Employment Opportunity Act of 1972 extended these periods from 90 days to 180, and from 210 days to 300.[6] If this amendment applies to appellant, his filing with EEOC (135 days after his discharge) was safely within

1. 42 U.S.C. § 2000e *et seq.* (1970), *as amended* (Supp. III, 1973).

2. The Arizona statute of limitations for employment discrimination claims has since been amended to coincide with amended 42 U.S.C. § 2000e–5(e). It now provides 180 days for initial filing with the state commission. A.R.S. § 41–1481 (1974).

3. In furtherance of the legislative policy expressed in § 706(b) of the 1964 Act, EEOC regulations provide that on receiving a complaint not previously filed with the appropriate state or local agency, EEOC will send a copy of the complaint to that agency, and suspend action on the complaint until the state agency has terminated its own proceedings, or until 60 days have passed, whichever is sooner. 29 C.F.R. § 1601.12(b)(1) (1974).

4. 42 U.S.C. § 2000e–5(d) (1970). Title VII was amended on March 24, 1972, by enactment of the Equal Employment Opportunity Act of 1972, Pub.L.No. 92–261, 86 Stat. 103, *amending* 42 U.S.C. § 2000e (1970). Section 706(b) of the 1964 Act was relettered 706(c); section 706(d) was relettered 706(e). The limitation periods were extended from 90 to 180 days where the initial filing is with EEOC, and from 210 to 300 days where complainant first submits his claim to a state agency. 42 U.S.C. § 2000e–5(e) (Supp. III, 1973).

5. In *Dubois*, the 10th Circuit held that the judicial remedy was barred where the administrative claim was filed after both the state statute of limitations and the § 706(d) 90-day federal limitation had run.

6. *See* note 4 *supra*.

the shorter of the two federal statutory periods.

[1–4] The 1972 Act became effective March 24, 1972. The prior 90-day limitation had run on appellant's complaint some 54 days earlier. It is the general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred. *James v. Continental Insurance Co.*, 424 F.2d 1064, 1065–66 (3d Cir. 1970). But the question is one of legislative intent;[7] and though not free from doubt, we think it the more likely conclusion that Congress intended the extended limitations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period.

Section 14 of the 1972 Act provides:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.[8]

7. Appellee has not suggested that constitutional considerations bar "reviving" a "dead" claim of the kind involved here. Where lapse of time has not invested a party with title to real or personal property, it does not violate due process to "repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311–12, 65 S.Ct. 1137, 1141, 89 L.Ed.2d 1628 (1945). It is most improbable that Congress intended the lapse of 90 days to give the employer a vested right or property interest in immunity from liability for discriminatory acts.

The Supreme Court, in *Campbell v. Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885), "adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Chase Securities, supra*, 325 U.S. at 314, 65 S.Ct. at 1142. Even though the limitations provision is contained in the same statute that created the substantive liability, it does not necessarily measure the right. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556–59, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974); *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 426–27 & n.2, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965); *Glus v. Brooklyn E. Dist. Term.*, 359 U.S. 231, 234–35, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959); *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 360–67, 64 S.Ct. 128, 88 L.Ed. 96 (1943). The question remains one of legislative intent.

William Danzer & Co. v. Gulf & Ship Island R.R., 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126 (1925), is not to the contrary. It had been settled in previous cases that the two-year limitations period provided in the Commerce Act for shippers to file damage claims against carriers "not only barred the remedy, but also destroyed the liability of defendant to plaintiff. On the expiration of the two year period, it was as if liability had never existed." 268 U.S. at 636, 45 S.Ct. at 613 (citations omitted). This construction of the limitations provision had been thought necessary to implement the strong congressional policy favoring uniformity of rates among all shippers, a policy which might otherwise be undermined either by application of varying state periods of limitation or by the carriers' waiver of the limitations defense in some cases but not others. *Phillips v. Grand Trunk Ry.*, 236 U.S. 662, 667, 35 S.Ct. 444, 59 L.Ed. 774 (1915). *See also Midstate Horticultural Co., supra*, 320 U.S. at 360–67, 64 S.Ct. 128.

A close reading of *Chase Securities* indicates that the Supreme Court did not distinguish *Danzer* on the ground that the limitations provision was contained in the statute that created the substantive liability. Rather, the Court relied on the fact that, for the reasons suggested. Congress had intended the expiration of the limitation period to put an end to the existence of the liability itself, not to the remedy alone. 325 U.S. at 312 n.8, 65 S.Ct. 1137.

There is no reason to believe that Congress departed from the general rule that statutes of limitations go to matters of remedy only when it passed the 1964 Act, and "in creating a liability also put a period to its existence." *Chase Securities, supra*, 325 U.S. at 312 n.8, 65 S.Ct. at 1141. From all that appears, Congress intended by the 90-day limitations period to do no more than prevent EEOC and the courts from dealing with stale claims. *Id.* at 314, 65 S.Ct. 1137.

Finally, there has been no suggestion in this case that the limitations provision tended to induce reliance of a kind that would make its retroactive extension so oppressive as to violate due process. *Id.* at 315–16, 65 S.Ct. 1137.

8. Act of March 24, 1972, Pub.L.No. 92-261, § 14, 86 Stat. 103.

Section 14 of the 1972 Act originated as an amendment to S. 2515, proposed by Senator Javits in response to a request by the Justice Department that EEOC's new power to bring suit against violators be made applicable to the Commission's two-year backlog of pending

Initially, both the House and Senate bills provided that the amendments to section 706 would *not* apply to charges filed prior to the effective date of the amendments. H.R. 1746, 92d Cong., 2d Sess. § 10 (1972); S. 2515, 92d Cong., 2d Sess. § 13 (1972); U.S.Code Cong. & Admin.News 1972, p. 2137. Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable to pending claims. *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1355 (6th Cir. 1975); *Koger v. Ball*, 497 F.2d 702, 708 (4th Cir. 1974). But Congress did not limit section 14 of the 1972 Act to the new remedy, although it would have been simple to do so. The language of section 14 is sweeping. It includes all amendments to section 706. Congress was, of course, aware of the other amendments to section 706 contained in the same bill. The provision extending the limitation periods was called to Congress' attention by committee reports and in floor debate.[9] In both the House and Senate, prior court decisions maximizing coverage within the given time limits were noted with approval, and the remedial purpose of extending the 90-day period to 180 days was emphasized.[10]

The words of section 14 affirmatively suggest an intention to encompass discriminatory conduct that occurred before the Act was passed. "[C]harges pending with the Commission on the date of enactment of this Act" could only involve conduct occurring prior to that date. It might be contended that a charge filed with EEOC after the pre-amendment 90-day limitation had expired, as in this case, was not "pending" on the effective date of the Act. It is unnecessary to argue the point. Section 14 also makes the amendments applicable to "all charges filed thereafter." Since appellant's claim was not formally "filed" until EEOC assumed jurisdiction after the claim was returned by the Arizona Commission,[11] it fell within the literal words of the statute.

[5] There is no substantial reason for giving less than their full meaning to the words of section 14. Even as extended, the time limits under the statute are exceedingly short, particularly since, as Congress noted, most complainants are laymen representing themselves.[12]

cases. *See* 118 Cong.Rec. 4816 (1972); S.Comm. on Labor & Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1674 (Comm. Print 1972).

9. 118 Cong.Rec. 7167 (1972); 118 Cong.Rec. 7565 (1972); S.Rep.No.415, 92d Cong., 1st Sess. 2, 36–37 (1971) (to accompany S. 2515); H.R.Rep.No.238, 92d Cong., 1st Sess. 27 (1971) (to accompany H.R. 1746).

10. 118 Cong.Rec. 7166 (1972); 118 Cong.Rec. 4941 (1972).

11. EEOC regulations provide that when a copy of the complaint has been submitted by EEOC to the designated state agency,

> . . . unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after sixty days have passed, whichever comes first, the Commission will consider the charge to be filed with the Commission and commence processing the case. Where the State or local agency terminates its proceedings within sixty days without notification to the Commission of such action, the Commission will consider the charge to be filed with it on the date the person making the charge was notified of the termination.

29 C.F.R. § 1601.12(b)(1) (1974).

12. 118 Cong.Rec. 7167 (1972); 118 Cong.Rec. 4941 (1972).

It is made clear in the Act itself that Congress did not intend to permit the states to obstruct a complainant's easy access to Title VII remedies by imposing onerous procedural requirements:

> If any requirement for the commencement of [state or local] proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of [subsequent filing with EEOC] at the time such statement is sent by registered mail to the appropriate State or local authority.

42 U.S.C. § 2000e–5(c) (Supp. III, 1973).

The remarks of Senator Humphrey, 110 Cong.Rec. 12725 (1964), are also pertinent here:

> We sought merely to guarantee that these States [which have fair employment laws] will be given every opportunity to employ

The Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of victims of discrimination. *EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187, 189 (9th Cir. 1974). Accordingly, "courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity resolved them in favor of the complaining party." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970).

[6] We conclude, therefore, that the applicable period for an initial filing with EEOC was 180 days rather than 90 days, and appellant's complaint was timely filed on the date when it was returned to EEOC's by the Arizona Commission and formally "filed." Appellee argues that failure to file within the state limitations period denies appellant the longer federal limitation period available to a complainant who properly invokes the state remedy. Since we have held that appellant has the benefit of the 1972 amendments, and since he filed within the 180-day period applicable where there is no prior resort to state proceedings, it is irrelevant whether the longer federal period was also available to him. That question we do not reach. *Cf. Olson v. Rembrandt printing Co.*, 511 F.2d 1228 (8th Cir. 1975).

The remaining question is whether appellant's federal judicial remedy is barred because he failed to file his complaint with the Arizona Commission within the 60-day state limitation period. We conclude that it is not. If the state in which the unlawful practice occurred affords a remedy, prior resort to that remedy is a precondition to intervention by EEOC and suit in federal court. *EEOC v. Wah Chang Albany Corp., supra*, 499 F.2d at 189 n.3. If access to EEOC and the federal court were also conditioned upon invocation of the state remedy within a period of limitation shorter than that required for application to EEOC, the state and not the federal period of limitations would control the availability of the federal remedy. The complainant would be required to file his charge of discrimination, not within the period fixed by Congress, but within the period fixed by the state in which the unlawful practice occurred.

"If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg v. Ambrecht*, 327 U.S. 392, 395, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946). The shorter of the two federal limitation periods represents the judgment of Congress as to the proper balance between the time reasonably required by the employee to prepare and file a claim of discrimination, and protection of the employer from a stale claim. It is unlikely that Congress intended that its judgment with respect to the maximum period within which a claim of employment discrimination affecting interstate commerce might be made could be displaced by legislatures of the states.

[7] "In so saying we are not passing upon the validity of any state limitation period as applied to claims of employment discrimination filed with it, but merely noting that the state limitation period cannot govern the efficacy of the federal remedy." *Olson v. Rembrandt Printing Co., supra*, 511 F.2d at 1232. Presumably the state has chosen its limitation period on the basis of what it considers proper for protection of the state right. But the state remedy may be significantly different in kind or scope from the federal remedies afforded by Title VII. The sole remedy offered by the state in *Crosslin v. Mountain States Telephone & Telegraph Co.*, 422 F.2d 1028 (9th Cir. 1970), *vacated and remanded*, 400 U.S. 1004, 91 S.Ct. 562, 27 L.Ed.2d 618 (1971), was a small fine imposed on the employer. A limitation period that might be appropriate when the sole redress afforded is a criminal penalty against the employer, may be inappropriate to the extensive scheme of injunctive relief and personal compensation contemplated by Title VII.

The only argument made against this construction of the statute is that it would permit complainants to avoid state intervention by waiting until the state statute of limitations has expired and then filing with EEOC, thus allowing complainants to frustrate the intent of Congress that the state be afforded the first opportunity to resolve problems of employment discrimination within its borders.

It is not suggested why the employee would wish to forego an available state remedy. Prior utilization of the state remedy would not impair the availability of the federal remedy, for the two are supplementary, not mutually exclusive. A complainant would save no time by bypassing the state remedy, since EEOC would in any event defer to the state for 60 days, and is required to defer no longer. Section 706(b) and (c), 42 U.S.C. § 2000e–5(c) and (d). Moreover, if the risk of deliberate bypass of the state agency were real, the state could readily avoid it by providing a limitation period no shorter than the federal period—as, in fact, Arizona has now done. A.R.S. § 41–1481 (1974).

Dubois v. Packard Bell Corp., supra, 470 F.2d 973, is not contrary to our holding. Complainant Dubois had not complied with the shorter of the two federal periods of limitation. *Olson v. Rembrandt Printing Co., supra*, 511 F.2d 1228, supports our holding, though the court also decides an issue we do not reach: whether the longer federal limitations period would be available to a complainant whose state filing is untimely.

Our holding is consistent with EEOC decisions and regulations, although EEOC also resolves the issue we have reserved, arriving at a conclusion contrary to that of the Eighth Circuit in *Olson*. *See* Case No. KC 7–5–315, 1973 CCH EEOC Dec. ¶ 6024 (1969); Case No. KC 7–3–187, 1973 CCH EEOC Dec. ¶ 6058 (1969).

Reversed.

their expertise and experience without premature influence by the Federal Government.

. . . . . .

At the same time, we recognized the absolute necessity of providing the Federal Government with authority to act . . . . The basic rights protected . . . are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected. In instances where the States are unable or unwilling to provide this protection, the Federal Government must have the authority to act.

Senator Humphrey's comments indicate that Congress' prime concern was protection of a federally created right. Interested states clearly are to be accorded deference; this deference, however, is to take the form of an *opportunity* to act. If the state should decline, for whatever reason, to deal with a complaint filed within the period Congress has specified, we find in the legislative history no suggestion that such refusal should be permitted to deprive a complainant of his federal remedy. *See Pacific Maritime Ass'n v. Quinn*, 465 F.2d 108, 110 (9th Cir. 1972).

APPENDIX "B"

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TPX2 0427

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., ~~Mrs., Miss~~) (indicate) Mr. Ruel Davis Phone Number

Street Address 257 E 10th Ave.

City Mesa State Arizona Zip Code 85202

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☒ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Valley Distributing Co. (Yellow-Front Stores)

Street address 1621 E Main

City Mesa State Ariz. Zip Code

AND (other parties if any) Elden Stringfellow &
Jerry McFall
Doris Cunningham

4 Have you filed this charge with a state or local government agency? Yes ☐ When MONTH DAY YEAR No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month 12 Day 31 Year 1972

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I was discriminated against in many ways on the terms and conditions of my employment because of my religion - Protestant (Christian). I am not Mormon which most of the company is, i.e. management.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 3-14-72 Ida D. Davis (Sign your name)

Subscribed and sworn to before me this 14th day of March 1972

Elizabeth Ahlers (Name) Equal Employment Ass't (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APP.: BUR. OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-68)